No. 21561

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WYOMING FARM BUREAU MUTUAL INSURANCE COMPANY, a corporation,
Appellant,

-vs.-

CURTIS L. SMITH and JAMIE L. SMITH,
Appellees.

Appeal from the United States District Court
for the District of Montana

BRIEF OF APPELLANT

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SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

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STATEMENT OF JURISDICTION

This action was prosecuted in the United States District Court for the District of Montana, Missoula Division, under the provisions of *28 U.S.C., Section 1332.* The jurisdictional amount and diversity of citizenship were admitted to exist through allegations in plaintiff's Complaint, (Tr. p. 2) and, admissions in defendants' Answer. (Tr. p. 5)

The action was for declaratory judgment pursuant to the provisions of *28 U.S.C., Section 2201.*

This court has jurisdiction of this appeal pursuant to the provisions of *28 U.S.C., Section 1291*, and *28 U.S.C., Section 1294*. The appeal to this court was perfected in compliance with *Federal Rules of Civil Procedure, Rule 73, et seq.;* and the rules of the *United States Court of Appeals for the Ninth Circuit* (Tr. pp. 30, et seq.)

STATEMENT OF THE CASE

This appeal is taken from the decision of the Honorable Russell E. Smith, United States District Judge, set forth in the Opinion in Civil No. 1120, United States District Court for the District of Montana, Missoula Division, (Tr. pp. 22, et seq.) and the Judgment entered thereon on the 15th day of November, 1966. (Tr. p. 29)

This appeal raises no issue or controversy over any of the relevant and material facts.

Prior to the year 1964, the Appellant, who we shall hereafter refer to as Wyoming appointed Robert L. Everhard as its agent in Granite County, Montana. (Tr. pp. 22, 23) The agency relationship between Everhard and Wyoming was formed through Wyoming's "Standard Agent's Agreement." (Tr. pp. 18 through 21)

Some time prior to January 24, 1964, Curtis L. Smith (one of the Appellees) sought out Everhard and told him that he, Smith, was interested in fire insurance for his poultry house and contents. As a

result, Everhard went to see Smith at his home on the evening of January 24, 1964. During the course of the evening, Smith signed an application for insurance (Tr. pp. 16, 17) and delivered $66.00 to Everhard to cover the first annual premium. (Tr. p. 23)

The application, together with the premium, was mailed to Wyoming at its Home Office in Laramie, Wyoming. The Home Office promptly rejected the application and returned it, together with the premium to Everhard, who received it in Philipsburg, Montana, on *February 3, 1964*. (Tr. p. 23)

Everhard made efforts to reach the Smiths on that day but was unsuccessful. During the early morning hours of *February 4, 1964*, the poultry house and contents which were described in the application, burned. (Tr. p. 23)

Later in the day of February 4, 1964, Jamie L. Smith, the wife of Curtis L. Smith, advised Everhard of the fire. At that time Everhard advised Mrs. Smith of Wyoming's rejection of the application and delivered to her the letter of rejection, the rejected application, and the $66.00. Later the $66.00 was tendered back to Wyoming, which refused to accept it. (Tr. p. 23)

THE QUESTIONS PRESENTED

Inasmuch as Wyoming had promptly rejected the Smiths' application for insurance on January 31, 1964, and had returned the rejected application and first annual premium to Everhard prior to the fire loss of February 4, 1964, can Wyoming be bound to

provide coverage for the loss which is agreed to be in the amount of $17,934.00?

This question will turn upon the answer to the question as to whether or not Everhard on January 24, 1964, had authority to immediately bind Wyoming to a fire insurance contract with the Smiths.

The District Court held that Everhard had authority to *immediately bind* Wyoming on January 24, 1964, and, that through the exercise of this authority, Wyoming must provide coverage for the loss which the Smiths suffered on February 4, 1964.

SPECIFICATIONS OF ERROR

There were no findings of fact and conclusions of law, as such, in the trial of this case in the District Court. Insofar as the facts in this case are concerned, the Appellant believes that the lack of specific findings of fact is not material.

Because of the lack of conclusions of law, however, the Appellant must specify as error every material legal conclusion which the District Court *could* have made to support its ultimate decision. With this qualification in mind, the Appellant sets forth the following specification of errors:

1. The District Court erred in concluding that Everhard had *actual* authority to bind Wyoming to an insurance contract with the Smiths on January 24, 1964.

2. The District Court erred in concluding that Everhard had *implied* authority to bind Wyoming to an insurance contract with the Smiths on January 24, 1964.

3. The District Court erred in concluding that

Wyoming had vested Everhard with *ostensible* or *apparent* authority to bind Wyoming to an insurance contract with the Smiths on January 24, 1964.

4. The District Court erred in concluding that Wyoming, through Everhard or otherwise, had *waived* the express condition of the application for insurance which provided that the insurance applied for by Curtis Smith would not be effective until approved by Wyoming at its offices in Laramie, Wyoming.

5. The District Court erred in concluding that there was an estoppel to deny coverage as a result of the acts or omissions of either Wyoming or Everhard.

6. The District Court erred in concluding that Wyoming's agent, Everhard, accepted Smith's application for insurance on January 24, 1964 to be effective on January 25, 1964.

7. The District Court erred in concluding that the Smiths were entitled to judgment on their counter-claim against Wyoming.

8. The District Court erred in entering judgment in favor of the Smiths and against Wyoming.

SUMMARY OF ARGUMENT

The argument to follow can be summarized with the following statements of the Appellant's contentions:

1. In order to hold Wyoming bound to the Appellees the District Court had to find that Wyoming's agent, Everhard, had authority to bind the company on the date that the application for insurance was taken.

2. It appears to be uncontroverted that Everhard did not have actual or implied authority to bind the company under the "Standard Agent's" agreement between Wyoming and Everhard.

3. *Wyoming* did not intentionally or by want of ordinary care cause or allow the *Appellees* to believe that Everhard had authority as an agent to bind the company upon the date that the application for insurance was taken and therefore Everhard did not act under ostensible or apparent authority to bind the company.

4. The application for insurance plainly stated that the insurance applied for would not become effective unless and until the application was approved by Wyoming at its office in Laramie, Wyoming.

5. The statement concerning the acceptance of the application by Wyoming was acknowledged by the signature of one of the Appellees, thus negating any contention that Wyoming had clothed Everhard with ostensible or apparent authority.

6. The statement concerning the acceptance of the application by Wyoming was a condition precedent to the creation of any contract for insurance between Wyoming and Appellees.

7. Everhard had no authority to waive the terms of the application pertaining to acceptance by Wyoming.

8. The fact that Everhard had authority to complete the policy term portion of the application did not constitute actual or ostensible authority for Everhard to fix the effective date of an insurance contract.

9. The existing precedent from the State of Montana supports the position of Wyoming in this case.

10. The District Court failed to consider or apply the existing precedent in Montana to this case.

11. The legal authorities set forth in the District Court's opinion and decision are distinguishable and inapplicable to the legal issues raised in this case.

ARGUMENT

Wyoming, upon receipt of the application, acted to reject the application; and, *four days before the fire loss transmitted the rejection to its agent.* The agent, Everhard, attempted to notify the Smiths of the rejection by Wyoming the day before the fire. (Tr. p. 23)

In view of these facts, the only basis upon which Wyoming can now be bound would be on the acts of its agent, Everhard, prior to the rejection of the application by Wyoming. Specifically, we are concerned in this appeal with the nature and effect of the transactions between Everhard and Curtis Smith on January 24, 1964.

The ultimate issue to be resolved falls in the law of Agency. Did Everhard, as Wyoming's agent, *have the authority* on January 24, 1964 to bind Wyoming to an immediate contract for insurance with the Smiths?

I. EVERHARD DID NOT HAVE *ACTUAL* AUTHORITY TO BIND WYOMING TO AN IMMEDIATE CONTRACT FOR INSURANCE ON JANUARY 24, 1964.

R.C.M. 1947, Section 2-123, provides:

> "Actual authority is such as the principal intentionally confers upon the agent, or intentionally, or by want of ordinary care allows the agent to believe himself to possess."

Everhard's "actual authority" is contained in the "Standard Agent's Agreement." (Tr. pp. 18-21) Section 4 of the Agreement provided:

> "The Agent shall not make *** any contract of insurance * * *. The agent shall not incur any indebtedness or liability on behalf of the Company in any manner whatsoever."

Everhard's agency relationship to Wyoming is defined in Section 1 of the "Standard Agent's Agreement."

> "1. Company hereby appoints Robert L. Everhard as a General Agent of the Company for the purpose of soliciting applications for insurance and remitting initial premium within the territory designated herein and for servicing existing policies as may be required."

It is clear from this language in the Agreement that Everhard did not have *actual authority* to bind Wyoming to a contract for insurance with the Smiths on January 24, 1964. Nor can it be reasonably argued, in view of the language set forth above, that Everhard could have believed himself to possess such actual authority.

II. EVERHARD DID NOT HAVE *OSTENSIBLE* OR *APPARENT* AUTHORITY TO BIND WYOMING TO AN IMMEDIATE CONTRACT FOR INSURANCE ON JANUARY 24, 1964.

In Montana, an agent has such authority as the

principal actually or *ostensibly* confers upon him. *R.C.M. 1947, Section 2-122.*

Since it is clear, and the District Court may have so held, that Everhard did not have *actual* authority to bind Wyoming, then the only authority which Everhard could have conceivably possessed, which was sufficient to bind Wyoming, would have been *ostensible* authority.

Although this point is not completely clear from the District Court's opinion, it may be that the District Court based its ultimate decision upon a conclusion that Everhard was acting under *ostensible* authority. It is clear from the Montana law that the District Court had to find either (1) that Everhard had *actual* authority to bind Wyoming, or (2) that he was acting under *ostensible* authority to bind Wyoming. There are no other alternatives.

R.C.M. 1947, Section 2-124 defines ostensible authority as follows:

> "Ostensible authority defined. Ostensible authority is such as *a principal*, intentionally or by want of ordinary care, causes or allows *a third person* to believe the agent to possess." (Emphasis supplied)

The application for insurance (Tr. p. 17) contains the following:

> "It is understood and agreed that the insurance herein applied for shall not be effective unless and until approved by the Company at its office in Laramie, Wyoming."
>
> "Dated this 25th day of January, 1964."
>
> "CURTIS SMITH"

The language in the application quoted above, which was acknowledged by Curtis Smith by his signature, militates directly and unequivocally against any possible contention that Wyoming, "intentionally or by want of ordinary care," led Curtis Smith to believe that Everhard had authority to bind the company.

The District Court, in its opinion, seems to be saying that when Wyoming permitted Everhard to complete the policy term information on the application, which is described at page 24 of the Transcript, it created ostensible authority in Everhard to immediately bind the company.

This theory completely ignores the plain language of the statement in the application to the effect that the insurance applied for ". . . shall not be effective unless and until approved by the Company at its office in Laramie, Wyoming."

It is well established in Montana that *the language in the application reserving the right to accept was sufficient notice to the Smiths* that Everhard's authority was limited insofar as binding Wyoming to a contract for fire insurance on the spot. *R.C.M. 1947, Section 2-125; Weidenaar v. New York Life Insurance Co.*, 36 Mont. 592, 94 Pac. 1.

III. THE FACT THAT EVERHARD HAD AUTHORITY TO COMPLETE THE POLICY TERM PORTION OF THE APPLICATION DOES NOT CONSTITUTE A WAIVER OF ANY OTHER PROVISIONS OF THE APPLICATION.

The District Court, in its opinion, does more than

merely ignore the language of the application pertaining to the right of Wyoming to accept before the insurance applied for becomes effective.

The District Court has placed great and controlling significance upon Everhard's authority to complete the policy term portion of the application. The District Court suggests in its opinion that Everhard's authority to complete this portion of the application constitutes either (1) a waiver, or (2) actual authority to bind the company. The District Court is very concerned, in its opinion, with a retroactive commencement date. (Tr. pp. 24, 25)

In viewing the purpose of the policy term portion of the application, the Court concerns itself with a purely hypothetical situation which has no application to the undisputed facts in this case.

The Court agrees that the company has a right to select the risks which it would underwrite, and then, as a practical matter places this right completely out of the reach of the company.

There is nothing novel or unfair in the issuance of insurance policies which have been dated retroactively from the date of the company's acceptance of the application. Directly in point *on the effect of Everhard's completion of the policy term portion* of the application in this case is the case of *Mofrad v. New York Life Ins. Co.*, (CCA 10th, Utah) 206 F2d 491 (1953)

In the *Mofrad Case* the 10th Circuit Court of Appeals was confronted with the same contention as is

advanced by the District Court in this case in support of its decision.

> "But appellants argue that unless the insurance began on the date of the application, as specified in Part 3, *the premium would cover a period during which the company did not assume the risk*, and the insured would be paying for insurance for a period when he was not insured.
>
> "The application for the policy provided that the insurance policy should be dated as of the date of the application. 'It was within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding.' Jones v. New York Life Ins. Co., 1927, 69 Utah 172, 253 P. 200, 202. *The provisions in the application agreement do not fix the effective date of the insurance contract.* They simply impose conditions precedent to the taking effect of the insurance contract. *Shira v. New York Life Ins. Co., 10 Cir. 1937, 90 F2d 953. When read together they mean that the insurance coverage shall take effect only in the event the conditions precedent specified in the application are fulfilled, and then only as of the date of the application. Shira v. New York Life Ins. Co.*, supra." (Emphasis supplied.)

In the instant case, the District Court held directly contrary to what was held by the Court in the *Mofrad Case*. The District Court selected the policy term portion of Wyoming's application and Everhard's acts in completing this portion of the application as the single basis for fixing the effective date of the fire insurance contract which it found was in existence in this case.

IV. THE OPINION AND DECISION OF THE DISTRICT COURT IS NOT SUPPORTED BY THE EXISTING LAW OF THE STATE OF MONTANA AND IS A DEPARTURE FROM ESTABLISHED PRECEDENT IN THAT STATE.

The District Court, in its opinion and decision, refuses to accept and follow an established precedent in Montana on the point in issue.

In the case of *Kennedy v. Mutual Benefit Life Ins. Co. of Newark, N.J.*, 205 Fed. 677 (1913) essentially the same question was before the District Court for the State of Montana. The facts in the *Kennedy Case* are almost identical to the facts in the instant case.

Kennedy made application for life insurance with Mutual through its local agent. The first annual premium was paid by Kennedy and in return therefor he received from the agent a receipt which recited:

> "This receipt will be binding on the company from the date of medical examination, *provided the application for insurance is approved and policy issued by the company as applied for.*" (Emphasis supplied.)

The application was disapproved by the company's medical board, and ultimately, on January 22, 1906, a letter was written by the company to its Butte agent stating that additional medical information was required.

Kennedy was accidentally killed on January 26, 1906, the day *before* the company's agent in Butte received the company's letter of January 22, 1906. Demand was made by Kennedy's beneficiary for the

proceeds of the policy applied for and refused by the company.

The Honorable George W. Bourquin, District Judge for Montana, in holding for the defendant insurance company said:

> "The contract of insurance sought was not consummated. *Kennedy's application must be read with the receipt* to discover the conditions upon which a contract for insurance would arise. Thus read, the application was an offer by the applicant for a contract of insurance, unilateral in its nature, by defendant, and to be accepted by defendant by (1) approval of the application, and (2) by issuance of a policy as applied for. Acceptance required both.
>
> "*Until so accepted, neither party was bound,* and *both parties had a right to a locus poenitentiae.* The contract would be created by defendant's performance of the conditions stipulated in the receipt, and not by any defendant's counter promise — by things done and not by words said."
>
> * * * *
>
> "The case may be likened to those wherein the application provides that insurance shall not be in force until delivery of the policy. Therein delivery, actual or constructive, is a condition precedent to the creation of a contract, even as issuance of the policy was in the instant case." (Emphasis supplied)

To the same result and effect is the case of *Weidenaar v. New York Life Ins. Co.*, 36 Mont. 592, 94 Pac. 1. The *Weidenaar Case* presents fundamentally the same question as was later presented in the *Kennedy Case*, although the Montana Supreme Court treats Weidenaar from the law of agency approach rather than the law of contracts. In the *Weidenaar*

Case the Montana Supreme Court stated at page *615 of 36 Montana:*

> ". . . I think, in this case, *consideration should be given to all parts of the transaction* in determining whether plaintiff (applicant) exercised reasonable care. These recitals in the application were, to some extent, at least, binding upon the plaintiff under the circumstances disclosed by this record. He cannot be heard to say that he relied upon so much of the application blank as disclosed the fact that it pertained to the business of the defendant, *but that he repudiates those provisions whereof beneficial to the company.*"

* * * *

> "It seems to me that some courts, of the very highest respectability and learning, have taken judicial notice of matters which they were not by law authorized to judicially know, *and have gone so far in holding insurance companies liable as to result in the application of different rules of contract law to them than would have been applied to individuals under the same circumstances.* I cannot agree that this may rightly be done. While I have no doubt that many life insurance solicitors resort to reprehensible means to obtain business, and sometimes commit crime as was done in this case, *I think the law should be applied, without prejudice, to all alike, and I feel certain that the same law that affords protection to a person dealing with an individual will, if properly construed and applied, afford equal protection to one dealing with a life insurance company.*" (Emphasis supplied)

It is noteworthy that the District Court in the instant case cites no Montana precedent for its decision.

V. THE LEGAL AUTHORITIES SET FORTH IN THE DISTRICT COURT'S OPINION AND DECISION ARE INAPPLICABLE TO THE LEGAL ISSUES RAISED IN THIS CASE.

It is respectfully submitted that, in view of the opinion written by the District Court (Tr. p. 22 et seq) the Appellant, in this brief should comment upon the legal authority which the District Court presumably relied upon to reach its ultimate result.

Mayfield v. Montana Life Insurance Company
62 Mont. 535, 205 Pac 669 (1922)

In its opinion, the District Court seems to rely to some extent upon the decision of the Montana Supreme Court in the *Mayfield Case.*

It is submitted that no part of the Montana Supreme Court's ruling in that case is applicable to the instant case. *Mayfield* considers the acts of a *general* agent. At *page 541* of the opinion reported in *62 Montana*, the Court quotes with approval a statement from *3 Cooley's Briefs on the Law of Insurance*, page 2478.

> "' The extent of an agent's power to waive conditions and forfeitures is, of course, dependent on the extent of his authority to act for the insurer. If he is a *general agent, his power to waive conditions* and forfeitures is according to the weight of authority, co-extensive with that of the insurance company itself.'" (Emphasis supplied)

In *Mayfield* the court found that Gutch "was a general agent of the insurance company" and that he "was clothed, prima facie, with the ostensible authority to, *and did waive the conditions* of the receipt"

which concerned acceptance of the application by the insurance company.

This Court has found that as between Everhard and the insurance company there was not a "general agency" relationship insofar as that term applies to the authority or power of an insurance agent. (Tr. p. 23) The undisputed evidence revealed that Everhard *believed he did not* have authority to bind the company, regardless of what his representations might have lead the Smiths to believe. Therefore, there is no question of implied authority in this case.

In view of this situation the key circumstance, general agency, which supports the decision in *Mayfield* is absent in this case.

Additionally, in the *Mayfield Case* the Supreme Court considered important to its decision the fact that the general agent "made it a *general practice to represent* to prospective patrons that the insurance taken out through him would be binding on the company from the date of the payment of the first year's premium and the passing of a satisfactory medical examination, and that the company had enjoyed a considerable amount of profitable business through the activities of this agent."

The mere mention of these circumstances by the Supreme Court indicates that such circumstances were significant to the Court's decision. There were no such circumstances present in the instant case. In fact, the undisputed evidence of the custom or practice of Everhard in this regard, is to the contrary.

R.C.M. 1947, Sections 13-715 and 13-717

In its opinion the District Court seems to rely to some extent upon the provisions of *R.C.M. 1947, Sections 13-715 and 13-717.* The plaintiff respectfully questions the applicability of either of these statutes to the instant case. These statutes are concerned with the interpretation or construction of a contract *that was otherwise legally entered into.* These statutes are not applicable to that phase of a contractual relationship which inquires into *the authority* of a party to enter into a contract. The question in *this case* is antecedent to any matter with which Sections *13-715* and *13-717* might be involved.

For the same reason the statement quoted by the District Court from *Williston on Contracts, Vol. 1, Sec. 98 (rev. ed. 1936) p. 314* is obviously inapplicable. Inherent in the statement from *Williston* is the fact that both parties possessed the *authority* to contract. Everhard's lack of authority to enter into a contract is the primary if not single issue in this case.

CONCLUSION

The part-time soliciting agent of a small fire insurance company obtained an application for fire insurance from the Appellees. The application and the first annual premium were forwarded to the company. Upon receipt of the application the fire insurance company immediately rejected the application and returned it together with the premium to the soliciting agent.

The agent attempted to inform the applicants that the company had rejected the application, but was unable to do so. On the date following the receipt

of the returned application and premium by the agent, the property which was the subject of the application was destroyed by hostile fire.

The District Court held that the contract for fire insurance was in effect as of the date of the taking of the application, *despite the fact that the company had formally and completely rejected the application between the date of the application and the date of the fire!*

Would the District Court's decision have been different had Everhard been able to contact the Smiths with the information prior to the fire loss? If so, why? Or, to logically extend the District Court's theory of the case, was Wyoming compelled to give the Smiths the customary 30-day notice (included in most insurance contracts) of its termination of coverage? If not, why not?

A decision, sound on the law, does not leave these remaining perplexities. The opinion of the District Court contains incongruous statements of law that are out of harmony with the past and provide no guide for the future.

It is respectfully submitted that the judgment of the District Court should be reversed and the matter remanded to the District Court with directions that judgment be entered for the Appellant.

Respectfully Submitted,

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CERTIFICATE

I CERTIFY that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing Brief is in full compliance with those rules.

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